



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

punished to the extent of a full accounting to each one whose rights have been invaded.²⁴

There are two distinct situations in which resort to a court of equity may be had in unfair competition cases, whether involving a trade-mark or not. In one it is to secure compensation for harm already done, as well as an injunction against a continuance of the injury, and in the other it is merely to prevent a threatened destruction or impairment of the complainants' goodwill by a possible confusion in the future. This distinction has not always been kept in mind, and in some of the cases where there had been no present pecuniary injury to the goodwill, an accounting has worked extreme injustice.²⁵ Such a situation was presented in *Straus v. Notaseme Hosiery Co.*,²⁶ where the relief sought was protection from future harm. Two hosiery companies obtained their labels, of similar design, but bearing different names, from the same designer and used them on goods that did not as yet compete. The prior user was given injunctive relief, but an accounting of profits was properly denied for the short reason that the plaintiff had suffered no loss. If, as is intimated in the case of *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*,²⁷ there must be a technical trade-mark to warrant an accounting, this case may be placed upon that ground, but to dispose of the case in this manner involves the needless perpetuation of a distinction in the laws of cognate subjects that are gradually merging into one.²⁸

MORTGAGES GIVEN MORE THAN FOUR MONTHS BEFORE BANKRUPTCY BUT RECORDED WITHIN THAT PERIOD. — Whether a mortgage given more than four months before the filing of a petition in bankruptcy, but recorded within that period, may be set aside by the trustee¹ depends

²⁴ *Clark Thread Co. v. Wm. Clark Co.*, 56 N. J. Eq. 789, 40 Atl. 686. In such case the wrongdoer should not fare better because he has harmed several instead of one, and in an appropriate action, he could no doubt be made to disgorge his entire profit.

²⁵ See George Cunningham and Professor Joseph Warren, "A Phase of Accounting in Trade-Mark Cases," 20 HARV. L. REV. 620, criticising *Regis v. Jaynes*, 101 Mass. 245, 77 N. E. 774, where an accounting of profits was allowed, though the defendant had never sold a single article in the territory then occupied by the plaintiff's business. This situation must be distinguished from cases where the defendant merely attempts to show that the public has not been deceived by his use of the plaintiff's mark in the same territory with the plaintiff. See *Saxlehner v. Eisner & Mendelson Co.*, 138 Fed. 22. But see *J. & C. Merriam Co. v. Saalfeld*, 198 Fed. 369, 377.

²⁶ 240 U. S. 179.

²⁷ *Supra*, notes 14 and 17.

²⁸ See ROGERS, GOODWILL, TRADE-MARKS, AND UNFAIR TRADING, 127, "There is no real difference except in the matter of evidence between a case of unfair competition and technical trade-mark." Actual fraud is not necessary in technical trade-mark cases. See *Scriven v. North*, 134 Fed. 366, 375; *HOPKINS, TRADE-MARKS*, 2 ed., § 99. However, it is usually said that fraud must be shown in order to get relief in a case of unfair competition. See *Church & Dwight Co. v. Russ*, 99 Fed. 276, 279; *Chas. E. Hires v. Villepigue*, 116 C. C. A. 452, 196 Fed. 890; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 551. However, this probably means only that unfair conduct must be clearly shown. See *Cellular Clothing Co. v. Maxton*, [1899] A. C. 326, 334.

¹ An agreement to withhold from record for the purpose and with the effect of securing credit not justified by the debtor's financial condition is evidence of fraud.

upon § 60 of the Bankruptcy Act of 1898, as amended in 1903, and again in 1910.² Under the original act such a mortgage was not voidable.³ Even after the 1903 amendment⁴ some courts held that it could not be set aside if it was not a preferential transfer at its inception.⁵ But under the law as it stands now, it is clear that a mortgage given to secure a preëxisting debt, even though not voidable when executed, may be set aside when recorded within the four months' period, if the necessary elements of a preference exist at the date of recording, and such recording is required.⁶ It would seem from the amended language of § 60 *b* that this should also be true even though the mortgage was originally given for a present consideration.⁷ For obviously the purpose of the amendment is to allow the transfer to be considered as taking place at the date of the recording, when recording is required, and at that date the consideration given when the mortgage was executed has ceased to be contemporaneous.⁸ Nevertheless some courts have reasoned that such a mortgage would cause no diminution of the bankrupt's estate⁹ and therefore could not be a voidable preference.¹⁰ It seems probable that the Supreme Court will take this view, since it has recently so decided in the analogous case of a contract of conditional sale, executed in a state which regards such a sale as a reservation of title, rather than as

Blennerhassett v. Sherman, 105 U. S. 100. See *In re Hunt*, 139 Fed. 283, 291. And a *fraudulent* conveyance is voidable by the trustee, regardless of its date. *BANKRUPTCY ACT*, § 70 *e*; *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545. See *Van Iderstine v. National Discount Co.*, 227 U. S. 575, 582. However, the mere failure to record promptly is not of itself fraudulent, where there is no proof of fraudulent intent. *Bean v. Orr*, 182 Fed. 599; *In re Roberts*, 227 Fed. 177.

² Section 47 *a* (2), providing that the trustee in bankruptcy, "as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings," has no effect when the recording precedes the filing of the petition, since the trustee takes the status of such a creditor as of the time when the petition is filed. *Bailey v. Baker Ice Machine Co.*, 36 Sup. Ct. 50.

³ *Humphrey v. Tatman*, 198 U. S. 91. See *Rogers v. Page*, 140 Fed. 596, 599.

⁴ This amendment added to § 60 *a* a provision that the four months' period should not expire "until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

⁵ *In re Sturtevant*, 188 Fed. 196; *Debus v. Yates*, 193 Fed. 427; *In re Klein*, 197 Fed. 241. But see *English v. Ross*, 140 Fed. 630; *First National Bank v. Connett*, 142 Fed. 33; *In re Hickerson*, 162 Fed. 345; *McElvain v. Hardesty*, 169 Fed. 31; *In re Beckhaus*, 177 Fed. 141; *Mattley v. Giesler*, 187 Fed. 970. In the case last cited, Hook, Circuit Judge, said, at p. 972: "Under the amended section an instrument of transfer required to be recorded or registered speaks at the time the requirement is complied with, and not at the time of its execution."

⁶ This result was reached, even before the 1910 amendment, in *In re Beckhaus*, 177 Fed. 141. Section 60 *b*, as amended in 1910, provides that transfers required to be recorded are voidable when recorded within the four months' period, if either at the time of the transfer or at the time of recording "the bankrupt be insolvent and the . . . transfer then operate as a preference, and the person receiving it or to be benefited thereby . . . shall then have reasonable cause to believe that the enforcement of such . . . transfer would effect a preference."

⁷ So held in *Brigman v. Covington*, 219 Fed. 500. Cf. *McElvain v. Hardesty*, 169 Fed. 311.

⁸ See 2 REMINGTON, BANKRUPTCY, 1240.

⁹ In *New York County National Bank v. Massey*, 192 U. S. 138, 147, decided before the 1910 amendment, the Supreme Court laid down the rule that there could be no preference unless there was a diminution of the bankrupt's estate.

¹⁰ *In re Watson*, 201 Fed. 962; *Anderson v. J. O. and N. B. Chenault*, 208 Fed. 400.

an absolute sale with a mortgage back. *Bailey v. Baker Ice Machine Co.*, 36 Sup. Ct. 50.¹¹

It is not entirely clear whether the court's decision in this case is based on the narrow ground that there was no "transfer" by the bankrupt, or on the broader ground that there was no diminution of the bankrupt's estate. If the Supreme Court means to rely on the broad ground, as the opinion seems to indicate,¹² it must logically decide the case of a mortgage given for present consideration and the case of a conditional sale in the same way. For in the case of a mortgage for a present consideration there is a transfer but no diminution of the bankrupt's estate. But if it abandons this test, or, regarding the transaction at the date of recording (as the amended language of § 60 *b* seems to require), it finds that there was at that time a diminution of the estate, it may then distinguish the cases on the ground that in one there is, and in the other there is not, a "transfer" by the bankrupt. Unless a line is thus to be drawn between a mortgage and a conditional sale,¹³ a further amendment to § 60 will be necessary in order to reach the result which seems desirable.¹⁴

When recording is not required, the amendments to § 60 have no application,¹⁵ so that preferential mortgages not required to be recorded still cease to be voidable four months after they are delivered, even though actually recorded within four months of bankruptcy.¹⁶ It becomes im-

¹¹ For a more complete statement of this case, see RECENT CASES, p. 776.

¹² Mr. Justice Van Devanter, in giving the opinion of the court, said, at p. 53: "It therefore is plain that § 60 *b* refers to an act on the part of a bankrupt whereby he surrenders or encumbers his property or some part of it for the benefit of a particular creditor, and thereby diminishes the estate which the Bankruptcy Act seeks to apply for the benefit of all the creditors. Applying this test to the contract in question, we think it did not operate as a preferential transfer by Grant Brothers, the bankrupts. The property to which it related was not theirs, but the Baker Company's. The ownership was not transferred, but only the possession, and it was transferred to the bankrupts, not from them. . . . So, there was no diminution of the bankrupt's estate."

¹³ Of course no such line can be drawn in jurisdictions which regard a conditional sale as equivalent to an absolute sale with a mortgage back. And even where such a distinction is technically possible, the result reached in the case of the conditional sale seems undesirable.

¹⁴ In *First National Bank v. Connett*, *supra*, Hook, Circuit Judge, said, at p. 41: "The withholding of a chattel mortgage from record assists the debtor to practice a false pretense. It enables him to maintain a financial standing to which he is not honestly entitled. That is generally the actuating purpose, and it is invariably the result. It induces prior creditors to forbear and other persons to extend credit. A plain and inexpensive method is prescribed by which a mortgagee may secure a priority of lien, and the evil results that may follow from ignoring it are obvious." The results are equally objectionable, whether the mortgage was given for a preëxisting debt or for a contemporaneous consideration.

¹⁵ Section 3 *b* of the Bankruptcy Act provides that "a petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after the date of the recording or registering of the transfer . . . if by law such recording or registering is required or permitted. . . ." The 1903 Amendment to § 60 *a*, as it passed the House of Representatives, also contained the clause "if by law such recording or registering is required or permitted." But the Senate struck out all that followed "required," thus limiting the operation of the amendment, as subsequently adopted by Congress, to cases where recording is "required." CONG. REC., 57th Cong., 1st Sess., vol. 35, pt. 7, pp. 6938, 6943.

¹⁶ *Martin, Jr. v. Commercial National Bank*, 36 Am. B. R. 25; *In re Roberts*, 227 Fed. 177.

portant, therefore, to determine when recording is "required" within the meaning of this section. On this question there has been considerable diversity of opinion in the federal courts. To adopt a literal construction and hold that recording is not "required" unless an unrecorded mortgage under state law is invalid as to every one, would defeat the purpose of the amendment to prevent secret preferential transfers, for under every recording statute an unrecorded mortgage is good as against the mortgagor and as against some classes of persons having actual notice. For this reason it has been held by some courts that recording is "required" under § 60 unless an unrecorded mortgage is good as against every one.¹⁷ In other words, it was thought that "the word 'required,' as used in the amendment, refers to the character of the instrument giving the preference or making the transfer,"¹⁸ without regard to the persons in whose favor the requirement is imposed. For the sake of uniformity it might well be argued that this should be the law.¹⁹ But as a matter of statutory construction, such an interpretation seems unsound. Accordingly other courts have held that "required" means "required as against general creditors."²⁰

This dispute has finally been settled by the Supreme Court in the recent case of *Carey v. Donohue*, Sup. Ct. Off. No. 179.²¹ Mr. Justice Hughes, in giving the opinion of the court, said: "The natural and, we think, the intended meaning was to embrace those cases in which recording was necessary in order to make the transfer valid as against those concerned in the distribution of the insolvent estate; that is, as against creditors, including those whose position the trustee was entitled to take." The result of this construction is that a mortgage which would be invalid as against the trustee under § 47 *a* (2), if unrecorded when the petition in bankruptcy is filed, will be voidable under § 60 *b* if recorded within four months of that date. The purpose of the amendment in question was to indicate under what circumstances the four months' period during which the trustee may avoid a preferential transfer begins to run from the time of recording, rather than from the time of the transfer. When an unrecorded mortgage is good as against that class of persons with whose "rights, remedies, and powers" the trustee is deemed to be vested, the date of recording would seem to be immaterial. But when recording is required to make the mortgage good as against that class, the four months should naturally begin to run at that time, rather than when the mortgage was given. The construction which the Su-

¹⁷ *First National Bank v. Connett*, 142 Fed. 33; *Loeser v. Savings Deposit Bank and Trust Co.*, 148 Fed. 975; *In re Beckhaus*, 177 Fed. 141; *Ragan v. Donovan*, 189 Fed. 138. In *In re Beckhaus*, *supra*, Baker, Circuit Judge, said, at p. 145: "The primal canon of statutory construction is that the language actually used be given its full and fair meaning, that unqualified words be taken without qualification, and that in the absence of ambiguity extraneous matters be not considered. Under this canon probably nothing more can profitably be said than, if recording is required, it is required. If required for any purpose, or without purpose, how can it be said to be not required?"

¹⁸ *Loeser v. Savings Deposit Bank and Trust Co.*, 148 Fed. 975, 979.

¹⁹ See 27 HARV. L. REV. 481.

²⁰ *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, 136 Fed. 396; *In re Hunt*, 139 Fed. 283, 286; *In re McIntosh*, 150 Fed. 546; *In re Jacobson & Perrill*, 200 Fed. 812; *In re Roberts*, 227 Fed. 177.

²¹ For a more complete statement of this case, see RECENT CASES, p. 776.

preme Court has adopted, therefore, as the opinion points out, "gives effect to the amendment and interprets it in consonance with the spirit and purpose of the Bankruptcy Act."

DECREE FOR SPECIFIC PERFORMANCE AS A WARRANTY DEED. — A recent Kansas case shows an interesting and novel application of the statutes permitting equitable action *in rem*. The court, having personal jurisdiction of the defendant, decreed specific performance of a contract for the sale of land within the state, under a statute¹ giving such a decree, if not obeyed, the same effect as the deed which should have been executed in accordance therewith. No deed was executed, but the vendor was held liable on a warranty against incumbrances on the ground that the decree had the same effect as the warranty deed the defendant should have given. *Paris v. Golden*, 153 Pac. 528.²

At common law, it was well established that equity acted *in personam*, on the conscience of the defendant, and could enforce its decree only by contempt proceedings. But the growing prejudice against imprisonment for contempt, the obvious helplessness of the court if the defendant proved contumacious,³ and the frequent failure of justice resulting from the difficulty of getting personal jurisdiction over the defendant, led to the adoption of statutes, in England, and almost all the states, giving the courts of equity certain powers to act *in rem*, on service by publication.⁴ Such statutes, so far as they concern the specific performance of a contract for the sale of land, are of two types: either the court orders a trustee to make the deed, or the decree itself will operate as a conveyance; in many states the court may use either method in its discretion.⁵ The courts of California have reached the same result without the aid of statutes.⁶ A corresponding development has taken place in the Civil Law.⁷ The French Code provides that the person to whom an obligation is due may obtain the authority of the court to carry out the undertaking at the cost of the obligor.⁸ Similar provisions are found in the German Code;⁹ and, moreover, when the obligor is bound to make declaration of

¹ KAN. GEN. STAT., 1909, § 5993. "When a judgment shall be rendered for a conveyance . . . and the party against whom the judgment shall be rendered does not comply therewith by the time appointed, such judgment shall have the same operation and effect, and be as available, as if the conveyance . . . had been executed conformably to such judgment; or the court may order such conveyance to be executed in the first instance by the sheriff."

² See RECENT CASES, p. 782.

³ See REPORT OF ROYAL COMMISSION ON CHANCERY PRACTICE, I, 8, 107.

⁴ See HUSTON, ENFORCEMENT OF DECREES IN EQUITY, 13-25.

⁵ See statutes collected in the appendix to Mr. Huston's book, *supra*. The position of the federal courts is treated in HUSTON, 25-38. There is no federal statute covering the point, and, as it is a question of procedure and not of substantive law, state statutes would not ordinarily control the federal courts. But the federal courts, realizing the defects of the procedure *in personam*, are inclined to take advantage of the statute of the state in which they are sitting. *Single v. Scott Paper Mfg. Co.*, 55 Fed. 553; *Deck v. Whitman*, 96 Fed. 873.

⁶ *Rourke v. McLaughlin*, 38 Cal. 196; *Wait v. Kern River Mining, etc. Co.*, 157 Cal. 16, 106 Pac. 98.

⁷ See HUSTON, ENFORCEMENT OF DECREES IN EQUITY, 39-53.

⁸ FRENCH CIVIL CODE, § 1144.

⁹ ZIVILPROZESSORDNUNG, § 883-88.